NO. 957.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CLARA E. SACKETT,

Plaintiff in Error,

vs.

MARY McCAFFERY AND JOSEPH McCAFFERY,

Defendants in Error.

BRIEF AND ARGUMENT FOR THE DEFENDANTS IN ERROR.

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ARGUMENT.

I.

THE STAMP QUESTION.

The plaintiff in error insists that the ruling of the court overruling her objection to the introduction of the homestead declaration was erroneous. Plaintiff in error objected to the introduction of said homestead declaration for the reasons:

First. That the said instrument offered in evidence was not stamped as required by the laws of the United States, in force at the date of its execution.

Second. That the notarial certificate of acknowledgment to said instrument offered in evidence, was not stamped as required by the laws of the United States, in force at the date of its execution.

Third. That the filing for record of the same in its unstamped condition was in violation of said laws, and that

The record thereof was void and of no effect against the rights of plaintiff.' (Transcript, pages 28 and 29.)

This objection was overruled by the court and the homestead declaration admitted in evidence.

Plaintiff in error does not insist upon the first ground of her objection, but contents herself with claiming that the homestead declaration should not have been admitted in evidence, because the certificate of acknowledgment attached to said declaration is unstamped.

This contention of plaintiff in error might very properly be disposed of with the single observation that there is nothing whatever in the bill of exceptions showing that either the declaration of homestead or the certificate of acknowledgment was not stamped as required by the laws of the United States, and also that the objection urged upon the trial was not sufficiently specific to enable the trial court to know what the specific objection was that was urged against the admission of the declaration in evidence. The only thing which appears in the record indicating that the declaration of homestead or the certificate of acknowledgment was unstamped, is the statement of counsel in making the objection thereto, that neither said instrument nor the notarial certificate of acknowledgment was stamped as required by the laws of the United States, in force at the date

of its execution. This statement is not proof of the facts stated therein, and may have been, so far as the bill of exceptions advises us, absolutely untrue, and said objection may have been overruled by the court for the reason that the same was untrue. There is no evidence in the bill of exception affirmatively showing that the declaration of homestead or certificate of acknowledgment did not bear the proper internal revenue stamps. (Transcript, pages 26, 27, 28 and 29.)

It is true that a copy of said homestead declaration is contained in the bill of exceptions. (Transcript, pages 27 and 28.)

An inspection of this copy as it appears in the transcript, does not show it to have been stamped, but this is not sufficient to show that said declaration or the certificate of acknowledgment were unstamped, for in contemplation of law, the stamp is no part of either the homestead declaration or of the certificate of acknowledgment.

In an extended note to the case of Knox vs. Rossi, Lawyers' Reports Annotated, Book 48, page 319, it is said:

> "The revenue stamp is not part of the instrument, and the fact that what appears to be a copy of the instrument in the paper book or settled case as prepared does not show that the instrument was stamped, is immaterial."

The following cases are cited by the author in support of this statement:

Hallock vs. Jaudin, 34 Cal. 167.
Trull vs. Moulton, 12 Allen, 396.
Cabbott vs. Radford, 17 Minn. 320.
Owsley vs. Greenwood, 18 Minn. 429.
Kiefer vs. Rodgers, 19 Minn. 32.

In Hallock vs. Jaudin, *supra*, the Supreme Court of California, on page 175, said:

"The point that the complaint fails to show a cause of

action because the copy of the note therein contained is without a copy of any internal revenue stamp, is not tenable.

"In Trull vs. Moulton, 12 Allen, 396, and Hitchcock vs. Sawyer, 39 Vermont, 412, a copy of the note declared on is annexed to the declaration. No copy, however, of a revenue stamp was given. The defendant demurred, but the court held that the stamp was no part of the note, and that therefore a copy of it was not necessary."

Every presumption is in favor of the regularity of the court's proceedings, and the correctness of its ruling. Therefore, in the absence of any affirmative showing in the bill of exceptions, that the certificate of acknowledgement did not bear an internal revenue stamp, it must be presumed, if the law requires that it should be stamped, that such was the case.

The objection of counsel was not sufficiently specific. It cannot be told therefrom whether the admission of the declaration was objected to, because the stamp was not of large enough denomination, or because the stamp was uncancelled, or because there was no stamp of any denomination upon the declaration or upon the certificate of acknowledgment, or because the stamps had been put on after the filing of said declaration for record without the formalities required by law in obtaining permission of the internal revenue collector for the district, and having the same cancelled by him. The language of the objection is that the declaration and the notarial certificate of acknowledgment to said declaration was not stamped as required by the laws of the United States, in force at the date of its execution. The court was not further enlightened and was left to determine without any aid from objecting counsel, what specific objection they desired to urge. This the court was not required to do, but might very properly overrule the objection without making an independent investigation of its own.

The objection which is now urged not having been specifically suggested to the court, and no ruling having been made upon such specific objection, the same cannot now be reviewed.

Ohio & Mississippi Railway Co. vs. Walker, 3 Am. St. Rep. 641.

Noonan vs. Caledonia Mining Co., 121 U. S. Rep. 400.

Railroad Co. vs. O'Reilly, 158 U. S. 334.

U. S. vs. McMasters, 4 Wallace, 680.

Burton vs. Driggs, 20 Wallace, 125.

Wood vs. Weimar, 104 U. S. 786.

Faber vs. Commercial National Bank, 62 Fed. Rep. 387.

In the case of Ohio & Mississippi Railway Company vs. Walker, *supra*, page 641, the court said:

> "Objections to evidence to be of any avail must be reasonably specific. The particular objection must be fairly stated. It is not enough to state that the evidence is incompetent or that it is immaterial and irrelevant. This much is implied in the bare fact of objecting; if it be unnecessary to state the particular objection, counsel might as well say, 'we object,' and done with it, since a mere general objection amounts to nothing more, for it is simply tantamount to an expression of the fact that counsel do object. It is no answer to the proposition asserted by the authorities to say that the evidence itself may reveal the objection, for this may be said of all incompetent and irrelevant evidence when carefully scrutinized, and if this be true, then there would be no reason for requiring a specific objection in any case. But there is reason for requiring the particular objection to be stated with reasonable certainty, for in the hurry of the trial it cannot be expected

that particular objections will occur to the judge, although if stated he would readily perceive their force. Counsel who are presumed to have studied the case ought to be able to state the particular objections, and if none are stated, it is fair to presume that none exist, since an objection which cannot be particularly stated is not worth the making. The rule is a reasonable one, just to the court, and not burdensome to the parties, and it has been accepted as the law at least since 1846."

It is insisted that the proof of acknowledgment is required to be stamped under the provisions of Schedule "A" of the War Revenue Act of June, 1898, which provides that "certificates of any description required by law, not otherwise specified in this act, ten cents." And the question is presented for consideration, whether the words, "certificates of any description required by law," includes the proof of acknowledgment of a homestead declaration, which proof is necessarily furnished by the notary public before whom the instrument is acknowledged. We do not think that it does.

In United States vs. Ishan, 17 Wallace, 503, the Supreme Court laid down the following rules to be applied in determining whether an instrument is subject to a stamp tax:

"First. Instruments described in technical language or in terms especially descriptive of their own character are classed under that head, and are not to be included in the general words of the statute.

"Second. The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. Science and skill are not required in their interpretation, except where scientific or technical terms are used.

"Third. The liability of an instrument to a stamp duty,

as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself.

"Fourth. If there is a doubt as to the liability of an instrument as to taxation, the construction is in favor of the exemption, because in the language of Pollock, C. B., in Girr vs. Scudds, a tax cannot be imposed without clear and express words for that purpose."

What plaintiff in error is pleased to call a certificate of acknowledgment, is universally referred to both in legal and ordinary nomenclature as "proof of acknowledgment" of an instrument. It is so termed in Sections 1600, 1601, 1602 and 1603 of the Code of Civil Procedure of the State of Montana, and is the only apt term by which the Congress of the United States could have specifically provided that the so-called "certificate of acknowledgment" of a notary should bear a ten cent stamp. Not having used the term "proof of acknowledgment" or the term "certificate of acknowledgment," the law necessarily raises a doubt as to its applicability to certificates of acknowledgment, and under the rules hereinbefore enumerated, the construction must be in favor of the exemption, because "a tax cannot be imposed without clear and express words for that purpose."

If, however, it should be considered that the language of the statute is specific enough and broad enough to include certificates of acknowledgment to an instrument of this character, then we apprehend that the Congress of the United States has exceeded its powers in imposing a tax upon the duties of officers of the state of Montana. The proof of acknowledgment of an instrument in the state of Montana may be taken before any justice of the supreme court, or any judge of the district court. It may be taken before clerk of a court of record, a county clerk, a notary public, or a justice of the peace. The taking of the

proof of acknowledgment and certifying thereto, is one of the functions of the state government, which is exercised through or by any or either of these several officials, and if the act of certification by the notary public of an acknowledgment can be taxed by the general government, then the same act performed by a justice of the supreme court or a judge of the district court must necessarily be taxed, and we do not believe that it would be seriously maintained that the Congress of the United States has the power to compel a judge of the supreme or district courts to pay a tax upon acts performed by him, either of a judicial or quasi-judicial character.

In United States vs. Railroad Company, 17 Wallace, 327, the Supreme Court said:

> "There are, however, certain departments which are excepted from the general power. The right of the states to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the federal government. * * * Their operation may be impeded and may be destroyed if any interference is permitted."

In Veazie Bank vs. Fenno, 8th Wallace, page 547, the court said:

> "It may be admitted that the reserved rights of the states, such as the right to pass laws to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of congress."

In the Collector vs. Day, 11th Wallace, page 113, it was held that congress could not impose a tax upon the salary of a judicial officer of a state, and the supreme court in that case said:

> "The means and instrumentalities employed for carrying on the operations of their government (referring to the state government), for preserving their existence and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limit, but the will of the legislative body imposing the tax. And more especially those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department and the appointment of officers to administer their laws."

In State ex rel. Lakey, Appellant, vs. Garton, Second American Reports, page 315, it was held that congress had no power to levy a stamp tax upon the official bond of a sheriff.

Such a requirement would also be beyond the power of congress, for the reason that a notary public acts judicially in taking acknowledgments and certifying to the same, and congress has no power to levy a stamp tax upon judicial acts performed in pursuance of the laws of one of the states.

That a notary public acts judicially in taking and certifying an acknowledgment to a deed or other instrument affecting real estate, the attention of the court is respectfully invited to the following cases:

Wedel vs. Herman, 59 Cal. 514.

Griffith vs. Ventress, 24 Am. St. Rep. 918.

Grider vs. American Freehold Land Mortgage Co., 99 Ala. 281.

American Freehold Land Mortgage Co. vs. James, 16 So. Rep. 887.

Thompson vs. New England Mortgage Security Co., 18 So. Rep. 315.

Wilson vs. Traer, 20 Ia. 231.

Stevens vs. Hampton, 46 Mo. 404.

Paul vs. Carpenter, 70 N. Car. 502.

Piland vs. Taylor, 113 N. Car. 1.

Lam vs. Crews, 113 N. Car. 256.

Jamison vs. Jamison, 31 Am. Dec. 536.

Withers vs. Baird, 32 Am. Dec. 754.

Louden vs. Blythe, 55 Am. Dec. 527.

Singer Mfg. Co. vs. Rook, 24 Am. Rep. 204.

Cover vs. Manaway, 115 Pa. St. 338.

Shields vs. Netherland, 5 Lea. 193.

Harkins vs. Forsyth, 11 Leigh, 307.

Bowden vs. Parish, 86 Va. 67.

Taverner vs. Barrett, 21 W. Va. 658.

Henderson vs. Smith, 53 Am. Rep. 139.

Harris vs. Burton, 4 Harr. 66.

Johnson vs. Wallace, 53 Miss. 331, 24 Am. Rep. 699.

Morris vs. Wadsworth, 17 Wend. 103.

Romanes vs. Frazer, 17 Grant's Ch. 267 (Canada).

Hetter vs. Glasgow, 21 Am. Rep. 46.

Heilman vs. Kroh, 155 Pa. St. 1.

White vs. Conley, 105 N. Car. 65.

In Wedell vs. Herman, 59 Cal. 514, the court said:

"In taking the acknowledgment, the officer acts judicially and if he blunders in certifying to an acknowledgment duly made, or makes a defective or false certificate, he cannot alter or amend it, because after taking the acknowledgment

and delivering the return, his functions cease, and he is discharged from all further authority."

In Mason vs. Connor, 54 Miss. 531, the court said:

"It is evident that the taking of an acknowledgment of a grantor is a *quasi*-judicial act. The officer who takes an acknowledgment acts in a judicial character in determining whether the person representing himself to be or represented by some one else to be the grantor named in the conveyance, actually is the grantor. He determines further whether the person thus adjudged to be the grantor, does actually and truly acknowledge before him that he executed the instrument."

That congress has no power to impose a tax upon judicial acts of state officers or the processes of the courts, the attention of the court is respectfully invited to the following cases:

Greig vs. Dimock, 9 Int. Rev. Rec. 129.
Warren vs. Paul, 22 Ind. 276.
Fifield vs. Close, 15 Mich. 505.
Jones vs. Keep, 19 Wis. 369.
Lewis vs. Randall, 30 How. Pr. 378.
Walton vs. Bryenth, 24 How. Pr. 357.
Mussleman vs. Mank, 18 Ia. 239.
Botkins vs. Spurgeon, 20 Ia. 598.
Ford vs. Clinton, 25 Ia. 157.
Harper vs. Clark, 17 Ohio, 190.

Said provision would also be unconstitutional for the reason that it diminishes the income of an official appointed by the state to execute and carry out the laws of the state, and subjects him to a penalty for a failure to comply with the requirements of a United States law, which requirement is an additional burden to that imposed upon him by the laws of the state.

Under the laws of the state of Montana, a notary is compen-

sated by the fees which he receives for his services in taking an acknowledgment which are fixed at a certain sum.

It seems clear under the war revenue act, that if the notary's certificate of acknowledgment must be stamped, he is required to stamp the same, and if he should fail to do so, he would be subject to the penalties provided in said revenue act. Section 7 of said act provides as follows:

> "That if any person or persons shall make, sign or issue, or cause to be made, signed or issued any instrument, document, or paper of any kind or description whatsoever without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be guilty of a misdemeanor, and upon conviction thereof, shall pay a fine, etc., etc."

Section 9 provides as follows:

> "That in any and all cases where an adhesive stamp shall be used for denoting any tax imposed by this act, except as hereinafter provided, the person using or affixing same shall write or stamp thereupon the initials of his name and the date upon which the same shall be attached or used, so that the same may not again be used."

The notary public being the person who takes the acknowledgment and the only person who signs and executes the proof thereof, in order to avoid the penalty provided for by statute would necessarily be compelled to see that the same was stamped, thus reducing his income and imposing new burdens upon him. That this cannot be done, see

Collector vs. Day, 11 Wall. p. 113.

Although it should be held that the proof of acknowledgment by the notary of a homestead declaration requires a ten cent stamp, it does not necessarily follow that because this is true

that the failure to affix said stamp to said proof of acknowledgment would exclude the homestead declaration from evidence, or prevent it from being recorded in the office of the county recorder. The provision of the internal revenue law excluding instruments from record and from being used in evidence, is highly penal in its nature and must be strictly construed. No words can be read into the statute and if any doubt exists from the language of the statute, such doubt must be resolved in favor of the parties seeking to introduce the instrument.

Section 14 of the War Revenue Act is invoked by the plaintiff in error to prevent the introduction of a homestead declaration in evidence. Such portion of said section as is material, reads as follows:

> "That hereafter no instrument, paper or document required by law to be stamped, which has been signed or issued without being duly stamped or with a deficient stamp, nor any copy thereof shall be recorded or admitted or used as evidence in any court until a legal stamp or stamps denoting the amount of tax, shall have been affixed thereto, as prescribed by law."

Clearly the words, "instrument, paper or document" refer to the principal thing, that is, the thing which is to be used in evidence. In this particular case, the principal thing is the homestead declaration. The proof of acknowledgment or certificate of acknowledgment is not the instrument, nor the paper, nor the document which was sought to be introduced in evidence. It was simply an incident to the principal thing. The proof of acknowledgment cannot by any proper construction of this statute be denominated an instrument or a paper or a document required by law to be stamped, and it was clearly the intention of this section of the statute to only prevent the introduction in evidence and the recording of such instruments,

papers or documents as are required, independent of the certificate of acknowledgment, to be stamped.

Congress evidently had in view the well established rule of law that where a party has done all he is required to do, he shall not be required to suffer for the neglect or failure of a public official to perform the duties imposed upon him by law, and it was not the intention of congress that if a notary public or a judge of the court should take an acknowedgment and certify to the same and fail to annex the ten cent stamp to the acknowledgment, that that should deprive the party of any of the legal benefits to be obtained from the instrument which he may have prepared and executed in proper form and acknowledged according to the laws of the state.

When the defendants in error had prepared their homestead declaration and executed the same, gone before a notary public and acknowledged it in the form provided by the laws of the state, and filed it for record in the office of the county clerk and recorder, their homestead right had been secured, and although the county clerk and recorder might have failed entirely to record the instrument, this being a duty imposed upon him by law, this failure to record could not be imputed to the defendants in error, nor their homestead right impaired thereby. It is equally true that after they had prepared their declaration and acknowledged the same as provided by law and filed it for record, the neglect or failure of the notary public to affix the stamp, cannot be imputed to them nor their rights impaired thereby; neither did congress intend that this particular penalty should attach for such neglect of a person over whom defendants in error had no control, and therefore congress advisedly used the words, "instrument, paper or document, required by law to be stamped," referring undoubtedly to the principal thing, the thing which is required to be recorded and

necessary to be used in evidence, and not to the certificate of acknowledgment, which is neither an instrument, paper nor document in the sense in which these terms are used in the statute.

It is also insisted by plaintiff in error that because said acknowledgment did not bear the stamp, the declaration was not entitled to be recorded in the county clerk and recorder's office of the county of Deer Lodge.

The provision of Section 14 of the War Revenue Act, *supra*, clearly does not apply to instruments required to be recorded under the state laws, but applies only to such instruments as are required by federal legislation to be recorded and to officers under federal control.

In Moore vs. Quirk, 105 Mass. 49, 7th Am. Rep. 499, it was held under the revenue law of 1866, that a similar provision had no application to instruments required to be recorded by the state law in the state recording offices; the court said:

> "The mortgage was recorded as required by the statutes of the commonwealth. The clause of the internal revenue act, which provides that instruments not stamped as therein required shall not be recorded, cannot be construed as prohibiting the performance by the officers of the commonwealth of the duties imposed upon them by its statute but must be limited in interpretation and effect to records required or authorized by acts of congress, for the same reasons upon which the prohibition in the same clause against giving unstamped instruments in evidence in any court, has been decided to be applicable to the federal courts only and not to extend to the state courts."

In Stewart vs. Hopkins, 30 Ohio St. page 524, the supreme court, referring to Section 163 of the act of 1866, and construing the same, said:

"Section 163 declares that no instrument required by law to be stamped, which is not sufficiently stamped, shall be recorded or admitted or used as evidence in any court, until stamped as required by law. Without denying that it is within the power of taxation conferred upon courts to levy taxes and collect them by means of stamps placed on written instruments and to enforce the observance of the law by the imposition of penalties, yet the power of congress to prescribe as a penalty that which invaded the rules of evidence in the state courts, has been denied by the highest courts of many of the states, and in others so gravely doubted that at the present time it may be regarded as settled by the decided weight of authority that, whether the disputed power exists or not, since the act does not in express terms apply to the courts of the several states, and the provision excluding unstamped instruments from being given in evidence, can have full application and effect by confining it to the federal courts, its application must be regarded as limited to the courts over which congress has legislative control.

"Carpenter vs. Snelling, 97 Mass. 452.
"Greene vs. Holloway, 101 Mass. 243.
"People vs. Gates, 43 N. Y. 40.
"Clements vs. Conrad, 19 Mich. 170.
"Craig vs. Dimock, 47 Ill. 308.
"Bunker vs. Greene, 48 Ill. 243.
"Wallace vs. Cravens, 34 Ind. 534.
"Griffin vs. Ranney, 35 Conn. 239.
"Duffy vs. Hobson, 40 Cal. 240.
"Bumpass vs. Taggart, 29 Ark. 398.
"Davis vs. Richardson, 45 Miss. 499.
"Dailey vs. Croker, 33 Tex. 815.

"The same sections of the act, which prohibit unstamped instruments and documents from being used in evidence, forbid the recording of such instruments. For the same reason, therefore, that the clauses prescribing a rule of evidence must be regarded as applicable to the federal courts only, those relating to the recording of instruments not stamped as required by law, must be held to apply to such instruments as are required to be recorded by federal legislation and to officers under federal control."

Moore vs. Moore, 47 N. Y. 467.

The same has been ruled under Section 14 of the War Revenue Act of 1898 in the case of People ex rel. Consumers' Brew. Co. vs. Fronne, 35 App. Div. 459, 54 N. Y. Supp. 833.

Loring vs. Chase, 50 N. Y. Supp. 312.

Gregory vs. Hitchcock Pub. Co., 63 N. Y. Supp. 975.

Cassidy vs. St. Germain, 46 Atl. 35.

In addition to the foregoing authorities, see the following:

Bennett vs. Morris, 37 Pac. 929.

Lathan vs. Smith, 45 Ill. 29.

Knox vs. Rossi, Lra. Book 48, page 305.

U. S. Express Co. vs. Haines, 48 Ill. 248.

Wilson vs. McKenna, 52 Ill. 43.

Hunter vs. Cobb, 1 Bush. 239.

Pargoud vs. Richardson, 30 La. Ann. 1286.

Davis vs. Richardson, 45 Miss. 499, 7 Am. Rep. 732.

Moore vs. Climer, 12 Mo. App. 11.

Schultz vs. Herndon, 32 Tex. 390.

From these cases and numerous others which might be cited, it appears that the great weight of authority is that the inhibition against the introduction of unstamped instruments as evi-

dence, does not apply to state courts, and for the same reason and upon the same principle the inhibition against the recording of unstamped instruments is not applicable to the record of such instruments in the recording offices of the several states, as is very clearly pointed out in the Massachusetts and Ohio cases, from which we have heretofore quoted at length.

By the act of March 2, 1901, amending the war revenue act, the provision of schedule "A" in reference to the stamping of certificates under which it is claimed this certificate of acknowledgment should be stamped, was repealed. It is true that Section 14, which provides that unstamped instruments shall not be recorded or received in evidence, was not repealed, but was continued in force, so far as applicable. This section could not have any effect or be applicable to a repealed portion of Schedule "A." It was continued in force and remained applicable to such portions of Schedule "A" as was left in full force and effect and not repealed. Had the entire Schedule "A" been repealed, then Section 14 would not have been continued in force, for there would have been no subjects to which it could have applied. And so far as that part of Schedule "A" applicable to this controversy is concerned, Section 14 was no longer applicable because that part of Schedule "A" had been repealed.

We respectfully submit that there is no rule of law better settled or more uniformly maintained than that when the law imposing a penalty is repealed, the penalty cannot longer be exacted. Therefore, when the law requiring certificates of acknowledgment to be stamped, if any such law ever existed, was repealed, which was long prior to the trial of this suit, the penalty for a failure to stamp such certificates could not longer be imposed, and when said homestead declaration was offered in evidence, it was properly received by the court.

In Yeaton vs. The United States, 5th Cranch, 281, the court, by Marshall, Chief Justice, said:

> "The court is therefore of opinion that this cause is to be considered as if no sentence had been pronounced, it has long been settled on general principles that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

The case of the United States vs. The Ship Helen, 6th Cranch, 203, was a case where the ship Helen, a vessel of the United States during the existence of the act of congress of the 28th of February, 1806, to suspend the commercial intercourse between the United States and certain ports of the island of St. Domingo, had traded with one of the prohibited ports contrary to that act. The act was suffered to expire on the 25th of April, 1808. Afterwards, to-wit, on the 20th of September, 1808, she was seized on account of that violation of the act by the collector of the port of New Orleans, but the libel was dismissed by the judge, on the ground that the law had expired. The United States appealed, but the Supreme Court of the United States affirmed the judgment.

In the case of the Schooner Rachael vs. The United States, 6th Cranch, 330, it was held

> "that no sentence of condemnation can be affirmed, after the law under which the forfeiture occurred has expired, although a condemnation and sale had taken place and the money had been paid over to the United States, before the expiration of the law, and this court in reversing the sentence will not order the money to be repaid, but will award restitution of the property, as if no sale had been made."

But it is useless to multiply authorities upon this point. It

has long since ceased to be a controverted one, and for this reason, if none other, the court did not err in admitting the declaration of homestead in evidence.

This rule as hereinbefore stated is particularly applicable to the penalties imposed by the war revenue act, and is consonant with sound public policy. Should any other rule be adhered to, or should the rule be announced as contended for by plaintiff in error, the titles to property would be indefinitely unsettled and these questions arising in the courts for many years. It would seem impossible in view of this well recognized principle of law to hold that when the law imposing the tax had been itself repealed, that the instrument which was the subject of the tax should be forever under the ban of judicial displeasure, as an instrument of evidence, because the tax was not paid.

It is plain that when the law imposing the tax has been repealed, all of the penalties, fines, forfeitures and disabilities assessed or imposed for its violation must necessarily go along with it and cease with it, unless the right to continue and enforce the same has been expressly retained and preserved by means of a proper saving clause contained within the repealed statute.

II.

THE FEDERAL HOMESTEAD QUESTION.

Plaintiff in error contends that the court erred in not admitting in evidence testimony tending to show that Joseph McCaffery, husband of Mary McCaffery, the person who made the homestead declaration, had made a homestead entry under the laws of the United States, to one hundred and sixty acres of government land, and that he afterwards obtained a patent thereto.

In the court below plaintiff in error did not pretend that the laws of the state of Montana were not complied with, or that Joseph McCaffery and Mary McCaffery, his wife, did not actually reside on the property described in their homestead declaration at the time said declaration was filed, but the contention was and is now made that although they actually resided and continued to reside upon said property in the City of Anaconda, that the fact that Joseph McCaffery entered land under the homestead act of the United States laws and obtained a patent thereto fraudulently without ever having resided upon the same, would defeat the homestead claim of Mary McCaffery to the property upon which they actually resided in the City of Anaconda.

The right to have a homestead exempt from execution for the debts of the homestead claimant, is a right arising under the laws of the state of Montana, and it is to them and to them alone that we must look for the requirements necessary to be fulfilled, before said homestead can be legally claimed.

The sections of the statute of the state of Montana which are material, are found in the Civil Code of said state, and are as follows:

Section 1670 provides: The homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as in this title provided.

Section 1671 provides: If the claimant be married, the homestead may be selected from the property of the husband or with the consent of the wife from her separate property. When the claimant is not married, but is the head of a family within the meaning of Section 1694, the homestead may be selected from any of his or her property.

Section 1673 provides: The homestead is exempt from execution or forced sale, except as in this title provided.

Section 1675 provides: The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife.

Section 1676 provides: A homestead can be abandoned only by declaration of abandonment, or a grant thereof executed and acknowledged:

1st. By the husband and wife, if the claimant is married.

2d. By the claimant if unmarried.

Section 1700 provides: In order to select a homestead, the husband or other head of the family, or in case the husband has not made such selection, the wife must execute and acknowledge in the same manner as the grant of real property is acknowledged, a declaration of homestead and file the same for record.

Section 1701 provides: The declaration of homestead must contain:

1st. A statement showing that the person making it is the head of a family, or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit.

2d. The statement that the person making it is residing on the premises, and claims them as a homestead.

3d. A description of the premises.

4th. An estimate of their actual cash value.

Section 1702 provides: The declaration must be recorded in the office of the clerk of the county in which the land is situated.

Section 1703 provides: From and after the time the declaration is filed for record, the premises therein described constitute a homestead. Upon the death of a person whose property was selected as a homestead, it shall go to his or her heirs

or devisees, subject to the use of the widow during her life, if the property selected as a homestead, before selection, belongs to the husband and subject to the use of the husband during his life, if the property selected as a homestead before selection belong to the wife, and in no case shall the homestead be held liable for the debts of the owner, except as provided in this title.

Section 1693 provides: Homesteads may be selected and claimed:

1st. Consisting of any quantity of land, not exceeding one hundred and sixty (160) acres, used for agricultural purposes, and the dwelling house thereon, and its appurtenances, and not included in any town plot, city or village.

2d. A quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city or village, and the dwelling house thereon and its appurtenances, such homestead in either case shall not exceed in value the sum of two thousand five hundred dollars ($2,500.00).

It will be observed from the foregoing sections that something more than mere residence upon the land claimed as a homestead is required. That before homestead can be had under the state laws, a declaration of homestead must be prepared and filed, and that said declaration must contain the statement of numerous essential prerequisites to the claiming of a homestead right in land.

A federal homestead, so called, has none of the essential elements of a homestead under the state law, except the identity of names.

It is true that public lands are subject to a statutory homestead claim, but the selection of the same for a homestead must be made as in other cases.

Watterson vs. E. L. Bonner Co., 19 Mont. 554.
Gaylord vs. Place, 98 Cal. 472.

Plaintiff in error has pointed out the difference in the provisions of the homestead laws of the various states, and claims that there is as much difference in these provisions as there is in the provisions between a federal homestead and a homestead provided for under our statute.

The principal object of all statutory homesteads under the state law, is to preserve a home for the family, in case of adversity, for the widow and children, in case of the death of the husband, for the husband and children, in case of the death of the wife.

This object is not effected or this end attained by obtaining land under the provisions of the public land laws of the United States. The only exemption whatever which is given under those laws, is an exemption for debts contracted while the title to the land remained in the government of the United States. Such land, upon the issuance of patent therefor, immediately becomes subject to the payment of all debts thereafter incurred, and may be conveyed by the husband without the consent of the wife. They have none of the essential characteristics of the homestead provided for under the state law.

Section 1700, *supra*, gives to the wife the right to select the homestead, in case the husband has not made such selection.

By the words, "such selection," is meant the selection by filing a declaration duly executed and acknowledged, as provided for in said section. All the provisions of the state statute refer to and are applicable only to the statutory homestead provided for therein. This right is conferred absolutely upon the wife, and cannot be divested by the husband, or in any other manner, unless the husband has made or makes a selection of a homestead, in accordance with the laws of the state. This is not the case of the family or some member thereof having made and retained a valid homestead selection under the laws

of another state. The entry upon the public lands made by Joseph McCaffery was made under the federal law within the State of Montana, and if the entry of public lands under the federal homestead law would not be equivalent to the selection of a homestead under our statute, then it cannot be contended that the defendant Joseph McCaffery had ever made the selection of a homestead in the sense or in the manner provided for by the state law, or such a selection as would prevent the wife from availing herself of the provisions of Sections 1700 and 1701 of the Civil Code, *supra*.

In the case of Thomas vs. Malhan, 92 Cal. 1, the court on page 7 said:

> "The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could incumber or dispose of without the consent of the other, and which should at all times be protected against creditors."

When we bear in mind the fundamental object of the law, it is impossible to maintain with any show of reason the proposition that the rights acquired by the homestead entry under the laws of the United States are equivalent to the rights acquired under the statutory homestead law.

See American and English Ency. of Law, Vol. 15, page 526.

After a person has made a homestead entry upon the public lands the paramount title to the lands still remains in the government, and when said person has represented to the government that he has complied with the law and the patent is issued thereto, the land can be taken under attachment or execution for a debt incurred, immediately thereafter, and can be sold or incumbered immediately thereafter without the consent of the wife. This would indeed be a strange sort of a homestead

in the sense in which a homestead is reserved by the statute of the state of Montana, which statute provides that the homestead shall be exempt for all time from execution or attachment for the debts of the homestead claimant.

The statutory homestead in the state of Montana can be abandoned only by the filing of a declaration of abandonment or by a grant executed in the manner prescribed by law. The homestead acquired by the homestead entry upon the public lands is abandoned, so far as any exemption is concerned, as against debts thereafter incurred immediately upon the issuance of a patent therefor, and the issuance of a patent destroys any protection which the family of the homestead claimant may have theretofore had, for the husband can sell it or otherwise dispose of it without the consent of his wife, and leave the family unprotected. Furthermore, prior to the time of the issuance of the patent, the inchoate title and such rights as the homestead claimant may have in the land, are under the control and subject to the action of the interior department of the United States government.

The United States law forbids the sale of the homestead for debts incurred before patent has issued, in pursuance of the policy announced in the statute, which prohibits the sale, assignment or incumbering of the land entered as a homestead, prior to the issuance of patent.

If the government issued the patent, and immediately allowed the land to be attached for a debt incurred prior to the time of the issuance of the patent, there would be no sound reason why the government should not allow the land included within the homestead entry to be levied upon prior to the issuance of the patent, and if such were the case, the interior department of the government would be embarrassed in the administration of the laws by conflicting claimants to the land

embraced within the homestead entry. The rights acquired by a person under the United States laws by homestead entry (and it may be said that the family virtually acquired no right in the sense of a homestead exemption), are not equivalent or even analogous in any way to the rights acquired by a person and his family in making a homestead selection under the laws of the state.

If the contention of plaintiff in error is correct, that acquiring title, although fraudulently, to a tract of land under the homestead laws of the United States, is sufficient to prevent him from obtaining a homestead under the laws of the state of Montana, then the converse of the proposition must be equally true, namely, that if a person has acquired a homestead under the laws of the state of Montana by residence and by filing the declaration required thereunder, although he remove therefrom, if he does not abandon the same, which he can not do except by a declaration of abandonment or grant duly acknowledged, he cannot make entry and obtain a patent to one hundred and sixty acres of land, under the homestead laws from the government of the United States; we do not believe that counsel for plaintiff in error, with all their ingenuity, would undertake to maintain this position before this court, yet one is equally tenable with the other.

Counsel have cited many cases which they claim bear out their contention. They are too numerous to separately examine in this brief. Suffice it to say that an examination of said cases by the court will show that they have no application whatever to the question here to be considered. The only case even remotely bearing upon the proposition is the case of Hesnard vs. Plunkett, 60 N. W. Reporter, 159, and the most casual examination of that case will show that it has no application whatever to the facts of this case.

In that case the homestead claimant was actually living within the boundaries of the one hundred and sixty acres which had been taken up under the homestead laws of the United States. He had removed from the one hundred and sixty acres upon which he had formerly lived, and which he had claimed as a homestead under the laws of the state of South Dakota.

In the case at bar there is no pretense that Joseph McCaffery ever lived upon his pretended homestead claim, or ever removed from the lot in the city of Anaconda claimed as his home.

The laws of the state of South Dakota required that the homestead claimant should reside upon the land claimed to be exempt.

The homestead claimant in this case attempted to carve one hundred and forty-one acres from his pre-emption claim, to which he had received a patent, and upon which he had formerly lived, and attach it to nineteen acres of his government homestead claim upon which he was then actually residing, and claim the whole as exempt under the statutes of the state of South Dakota. In deciding the case, the court uses the following language:

> "At the time, then, that this one hundred and forty-one acres were sold by the respondents upon their judgment, appellant was living upon his government homestead upon which his entry was made for the purposes of actual settlement and cultivation. When appellant removed from his pre-emption claim and settled upon the government homestead, he in effect abandoned his homestead exemption right under the state law. He was in contemplation of law settled upon and occupying his whole quarter section of one hundred and sixty acres claimed by him as his government homestead. To hold, therefore, that appellant was settled upon and occupying his government homestead for

the purposes of acquiring title thereto, and yet that he was only occupying nineteen acres thereof, and one hundred and forty-one acres of his pre-emption claim, when claiming his said homestead exemption would involve an inconsistency, for if he lived upon and occupied his government homestead for one purpose, he must be held to be doing so for all purposes. The two quarter sections, though contiguous, were separate and distinct tracts of land. Section 2455, Com. Laws, provides that the homestead 'may contain one or more lots or tracts of land with the buildings thereon, * * * but must in no case embrace different lots and tracts, unless they are contiguous, or unless they are habitually and in good faith used as part of the same homestead.' It appears from the allegations in the complaint that the appellant claimed a specific tract of land, as his government homestead, embracing one hundred and sixty acres. He has no independent claim to nineteen acres thereof. His settlement or occupancy was either valid as to the whole quarter section, or was not valid to any part thereof. * * * But when he has settled upon and is occupying one hundred and sixty acres for the purpose of acquiring title thereto from the government, he cannot at the same time for another purpose claim that he is only occupying a small portion of the same."

The only effect of the testimony offered by plaintiff in error would have been to have shown that Joseph McCaffery, the husband of the homestead claimant, had fraudulently obtained title to one hundred and sixty acres of the public lands of the United States. This was not the question at issue in the case. The questions at issue were simply whether the defendants in error had complied with the state homestead law and were entitled to hold the land in controversy in the suit under the same.

The testimony showed that both Joseph McCaffery and Mary McCaffery, at the time they filed their declaration of homestead, actually resided upon the land in the city of Anaconda claimed as a homestead. That Joseph McCaffery had not theretofore made a selection of a homestead as provided by and in the form and manner authorized by the statutes of the state of Montana. That Mary McCaffery was his wife, and that she made the declaration for the joint benefit of herself and husband. That the premises claimed did not exceed one-fourth of an acre, and did not exceed the value of two thousand five hundred ($2,500.00) dollars.

That the declaration of homestead required by Section 1701 had been made and executed in manner and form as provided for in said section, and filed for record in the county clerk and recorder's office of Deer Lodge county, and that all the facts stated therein were true.

Under these circumstances, it was wholly immaterial what other land or property might have been owned by Joseph McCaffery or how he may have obtained the title thereto, whether fraudulently or otherwise, unless the plaintiff in error could have shown, as the court required her to do, that at the time said declaration of homestead was made and filed for record, Joseph McCaffery, the husband of Mary McCaffery, was not residing upon the premises claimed as a homestead, and even then we do not believe this fact, if established, would have defeated the homestead rights of Mary McCaffery and her family, provided Joseph McCaffery had not made a selection and filed a declaration of homestead under the laws of the state of Montana.

The court will observe that Section 1700, *supra,* provides that the wife may make the declaration, if the husband has not done so, and Section 1701 provides that the homestead decla-

ration shall contain a statement that the *person* making it, which in this case was Mary McCaffery, the wife of Joseph McCaffery, is residing on the premises, and claims them as a homestead; evidently this section grants the right to the wife, if she be residing on the premises, to claim them as a homestead for herself and family, even though the husband might have theretofore abandoned his family and have been residing elsewhere.

It has been so expressly ruled in Watterson vs. Bonner Co., 19th Mont. 554, in which case, on page 557, the court said:

> "The authorities are so numerous to the effect that the abandoned wife may claim the homestead exemption, that we do not think it necessary to discuss the question here."

See Frazer vs. Syas, 4 N. W. 934.

Collier vs. Latimer, 35 Am. Rep. 711.

Kennley vs. Hudelson, 39 Am. Rep. 31.

It was likewise so ruled in Gambette vs. Brock, 41 Cal.. page 79, in which case, on page 84, the court said:

> "But in the absence of any showing as to the causes of the absence of the husband from the homestead selected by his wife or any proof that he had a home or fixed residence elsewhere, or any other family than his wife, it appears to me to be entirely consistent with the spirit of the homestead act, that the wife, having a family of her own, should be allowed to select and establish a homestead by her own residence upon it with her family."

Plaintiff in error cites the case of Power vs. Burg, 18 Mont., as authority that the testimony should have been admitted for the purpose of showing the good or bad faith of the homestead claimants. He does not insist upon this proposition, and evidently understands full well that the case is not applicable. The case of Power vs. Burg arose under a different statute from the one which we are now considering. A statute which

did not require the filing of a declaration of homestead, and made the right to claim a homestead dependent at all times upon use and occupancy. The question in the case was whether Burg could claim a tract of land as a homestead upon which he had never made any kind of improvements, and which was never occupied by him or his family for any purpose whatever, by simply claiming that he intended to improve the same and occupy the same for a home. Upon the question of his good fatih in making the claim that he intended to occupy the same as a home, the court permitted the introduction of a homestead entry made upon the public lands of the United States by Burg. Had the testimony shown that Burg was actually occupying and living upon the land claimed as a homestead, there would have been no question of good faith in the case, and the court would not have admitted the testimony.

In the case at bar the question of good faith did not arise, the only question being whether the defendants in error complied with the law of the state of Montana, in selecting the homestead, which they claimed. If they did so comply with the law, their intentions for the future were wholly immaterial.

III.

THE TWO-HOUSE QUESTION.

Plaintiff in error contends that the defendants in error should have been allowed to hold but one of the houses which were situated upon the lot claimed by them as a homestead, and the assignments of error by which it is sought to raise this question are the exceptions taken to the refusal of the court to give certain offered instructions, which instructions are found on pages 38 and 39 of the transcript, which told the jury in effect that the character of the property, whether a homestead or not,

should be determined by the principal use to which it was placed.

The testimony shows without contradiction that the lot claimed as exempt was less than one-fourth of an acre in area; that upon the front part of said lot, facing the west, had been built what is termed in the testimony as two houses, but what we think the testimony shows in effect to be one house only.

The house which the McCaffery's used entirely was built before the other house, but the houses were joined together by a porch which was covered and passed from the original house to the new. The front yard of both houses was a common yard with no division fence, nor was there any division fence run between the two houses.

At the back of the houses there was a temporary fence built from the back end of what is termed in the testimony the "tenement house," which fence separated the back end of the lots to some extent. (See testimony, Pinegar, transcript, pages 34 and 35, and map, page 36.)

There is testimony showing that the house called the "tenement house" was rented off, and on both before and after the filing of the declaration of homestead, but there is no testimony in the record showing that any portion of the front yard or any definite portion of the back yard was ever exclusively occupied or leased to tenants.

If the court should take the view of the law suggested by the plaintiff in error, the material inquiry would be, what use the house called the "tenement house" and the land which has been arbitrarily allotted to it by the plaintiff in error was put to at the date of the filing for record of the declaration of homestead.

The only testimony upon this point, and it is absolutely uncontradicted, is the testimony of Lizzie McCaffery, who testified that at the date of the execution of, and filing for record of the declaration of homestead, the four rooms in the

brick portion of the southerly house were rented to one Moohr and his wife. Mary McCaffery and her husband were alternately occupying one of the rooms of said southerly or tenement house as a sleeping room.

Said witness also testified that for four or five years prior to said date said southerly building had been rented to tenants in a similar manner; that the fence built from the northeast corner of the southerly house was built of drygoods boxes and strips; was about three feet high, and was built to keep the McCaffery chickens out of the southerly yard because they were bothersome to the occupants of the southerly house; and also for the purpose of keeping the chickens out of the garden on the south side, which was kept by the occupants and the McCafferys jointly.

That the lot covered by McCafferys' homestead declaration contained less than one-fourth of an acre, which fact was uncontradicted. (See transcript, page 37.)

Mary McCaffery was the only witness who testified as to the occupancy of said southerly house at the date of filing of the declaration of homestead, and her testimony is uncontradicted, and must be taken as true. All other testimony in reference to its occupancy prior to the filing of this declaration, and its occupancy subsequent to the filing, is wholly immaterial.

In Skinner vs. Hall, 69th Cal. page 198, the court said:

> "Conceding, as claimed by the appellants, that he went back to the house for the purpose of qualifying himself to file a new declaration, still it does not follow that his residence was not actual. He had taken up his abode in the house and had slept there one night. His wife and child did not go there with him, but it was not absolutely necessary that they should. One may have an actual residence in a house though his family be away and he take his

meals elsewhere. Nor is the fact that he slept there but one night decisive of the question.

"After making an actual residence upon property one may file and maintain a homestead upon it at the end of a day as well as at the end of a month or a year. So one may file and maintain a homestead upon property which is partially rented out or used for other purposes than his residence."

We maintain that under the law of the State of Montana the entire lot upon which the claimant's residence is located is exempt, provided it does not exceed one-fourth of an acre in area or the value of $2,500.00.

The sections of the Montana statute defining homesteads are as follows:

Section 1670, Code of Civil Procedure: The homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as in this title provided.

Section 1693, Code of Civil Procedure: Homesteads may be selected and claimed: (1) Consisting of any quantity of land not exceeding one hundred and sixty acres used for agricultural purposes, and the dwelling house thereon and its appurtenances, and not included in any town plot, city or village; or (2) A quantity of land not exceeding in amount one-fourth of an acre being within a town plot, city or village, and the dwelling house thereon and its appurtenances. Such homestead in either case shall not exceed in value the sum of $2,500.00.

Section 1670, *supra,* is identical with Section 1237, Civil Code of California.

Section 1693, *supra,* is not found in the code of California, nor has it ever been incorporated in the laws of that state so far as we are able to determine, but the section which corresponds to it is Section 1260, Civil Code of California, which

reads as follows: Homesteads may be selected and claimed, first, of not to exceed $5,000.00 in value, by any head of a family; second, of not to exceed $1,000.00 in value by any other person.

Section 1693, *supra,* of the Code of Montana, not having been borrowed from California, has never been construed by the courts of that state, and the decisions on the homestead law of that state are not controlling, under this section of the homestead law, in the State of Montana.

If Section 1670, *supra,* stood alone, the question now presented to the court would be one of much difficulty. The decisions under similar statutes are very conflicting, but the introduction into the laws of Montana of Section 1693, *supra,* has greatly simplified the decision of this case and the construction put upon this section by the Supreme Court of the State of Montana, which construction is controlling in the United States Court, has obviated any difficulty which might have been encountered in its determination.

The case of Yerrick vs. Higgins, 22d Montana, page 502, is a case where the homestead claimant had included in his declaration of homestead two lots, the total area of which exceeded by 2,100 square feet one-fourth of an acre. The excess in area could have been taken off the east side of lot 5 without disturbing the dwelling by cutting off a strip lengthwise of his lot 16.2 feet in width.

The question presented to the supreme court was whether this excess in the declaration of homestead rendered void said declaration and subjected the whole of the property to execution.

The supreme court, in discussing these two sections of the Code, said:

> "The former of these provisions defines a homestead in general terms. The latter limits this general definition and *specifies particularly the subject-matter to which the selec-*

tion and claim may apply. Standing alone, the general definition would leave no limit to the amount or value of the property selected and claimed provided claimant resided in his dwelling upon it. Under this latter provision, then, if the property under which the homestead is to be selected is outside a town plot, city or village, the homestead may not exceed 160 acres in area nor $2,500.00 in value. If it is included in a town plot, city or village, the homestead may not exceed one-fourth of an acre with the same limitations to value. This language is clear and explicit.

"The declaration must, therefore, be in conformity with both these limitations unless by some other provision or by just implication from all provisions on the subject there be some way by which the failure to conform can be excused."

The court, after discussing the provisions stated, applicable to cases where the creditor is dissatisfied with the estimated value placed upon the homestead by the claimant and the way in which he may have the value judiciously ascertained and declared, proceeds to say:

"The policy of the area limit, however, is based upon a different principle. *The code contains no provision by which, after the homestead has once been selected, there can be a readjustment of the area and the surplus taken by the creditor.*

"If the selection is in compliance with the law, within the value limit, and remains there, the claimant is beyond the pursuit of his creditors and so far as they are concerned he may forever after retain the specific property selected except when the judgment has been obtained before the declaration is filed and when the judgment is actually made a lien upon the homestead. From and after

the declaration is filed for record the premises therein described constitute a homestead and in no case shall the homestead be held liable for the debts of the owner except as provided in this title. * * *

"The question, then, as to what is a compliance with the law in respect of the area to be claimed must necessarily be answered in the statement that the premises described in the declaration must fall within the statutory limit, otherwise, the declaration is ineffective to exempt the property claimed. We are confirmed in this conclusion when we remember that area is a matter of accurate measurement and easily ascertainable. It is not a matter about which men may differ. The claimant has it within his power to state it as a fact, and the policy of the statute is that he shall do so. If he can describe in his declaration premises containing greater area than the statute allows and still be held to have complied with the law, then he can by his own disregard of the actual fact and because *there is an absence of specific provisions of law* by which his creditors can contest his claim, secure a greater exemption than the law provides for him. The statute requires the claimant to describe the premises he claims, not the premises within which his homestead is included, or out of which it may be carved. And this requirement is neither harsh nor unjust. It simply demands of the claimant that he be honest and state the truth. The statute points out the way by which he may secure his exemption. He has but to follow and he is secure. If from his own carelessness or from fraudulent motives he fails to observe the law, he must suffer the penalty."

No language can be plainer than this. It conclusively establishes the fact that the homestead claimant in a city or town is entitled to one-quarter of an acre without any restriction as

to its use, provided only that his residence is located thereon and the entire value of the lot and improvements does not exceed $2,500.00.

In Clark vs. Shannon, 1st Nev. 568, a homestead was claimed by Shannon upon two adjoining lots, upon one of which he resided with his wife, and on the other lot he had a livery stable. Each lot was 50 feet by 100 feet, the two together making a square of 100 feet. One Clark attempted to foreclose a mortgage on the lot upon which the livery stable was situated, which mortgage was executed by Shannon without the concurrence of his wife, and Shannon resisted the decree for foreclosure on the ground that when he executed the mortgage the stable lot constituted a part of the homestead property, and was not bound by mortgage in which the wife did not join.

The court, by Beattie, J., says:

> "The only question raised in the court below was whether, under the circumstances of this case, the stable lot did constitute a part of the homestead property. The court below held that the homestead was confined to the lot on which the dwelling was situated, and did not include a separate lot which was devoted to business purposes."

The court, in reversing the judgment by Beattie, J., says:

> "We think there is no more force in the other objection that a distinct portion of the property was devoted to business purposes. The only limitation of the right to select the homestead lands is that they shall not exceed five thousand ($5,000.00) dollars in value. We do not think it was the policy of the law to preserve only a residence for the family of the insolvent debtor, but to secure also the means of making a living. To give an insolvent debtor a fine house to live in, without any means to support his family, would be an injury to his creditors, without a corresponding benefit to the debtor. But to protect him in

the enjoyment of a cheap and modest house for his family, together with such adjacent lands or business houses as will enable him to decently support his family, would be a wise and humane policy. We think such was the intention of the law. If a person is protected in the enjoyment of a homestead consisting of several hundred acres of land, not more, perhaps, than an acre is necessary to a house, garden, yard and all outbuildings necessary to the proper enjoyment of his residence. All the balance is devoted to the business of farming by which he makes his living. Yet it has never been questioned but that farms might be set aside as homesteads. Why then not a shop, a stable, a store house, or a hotel, be set apart with the homestead lands as readily as a farm, if the whole does not exceed in value the sum of five thousand ($5,000.00) dollars? We can see no reason for the distinction. We think then this property, if so claimed, would be exempt from execution as a part of the homestead. If exempt from execution, is it not equally exempt from the operation of a mortgage, executed without the concurrence of a wife? It was a part of the identical land on which the residence was situated. The whole together was worth less than five thousand ($5,000.00) dollars. Was not the building and occupancy of the house a dedication of the entire tract as a homestead, or rather did not the establishment of a homestead on that tract of land attach to the entire tract the privilege of exemption from forced sale, so long as the whole tract with its improvements was worth less than five thousand ($5,000.00) dollars? If so, it appears to us, the husband could not by his own act, without the wife, mortgage a part of the tract, although he left a portion of it unincumbered."

Goldman vs. Clark, 1st Nev. 607.

In Smith vs. Stewart, 13 Nev. 65, the rule announced in Clark vs. Shannon, *supra*, was approved, notwithstanding the change in the statute laws of Nevada in the meantime, and the court, by Leonard, J., on pages 75 and 76, says:

> "Shall it be said, then, unless the law compels the confession, that an industrious mechanic who owns a town lot upon which is his cheap dwelling, cannot invest his savings in a shop upon another portion of the lot, and call to his aid steam or water power, if he does not pass the five thousand dollar limit, without losing the law's protection, not only as to the shop, but even the land upon which it stands? The shop is in fact a part of the home place, and as important a part as the house itself. The land upon which it is built is a part of the house lot, and a dedication of that to homestead uses carries with it the tenements and hereditaments thereon."

Further on in the opinion the court says:

> "The appellant's construction would strip every ranchman of his land outside of that upon which his dwelling and its appurtenances are situated, because his farming lands are not more 'necessary or convenient' for home purposes than are the stores to respondents in this case. The farm lands and barns are surely convenient and necessary; they assist in the support of the family; but they are neither, in the sense of the word 'homestead,' as used by counsel for appellant; they are neither, for the purpose of affording a family shelter; but they are both, as we think, when used in the sense intended by the legislature, as interpreted in Clark vs. Shannon."

In Hubbell et al. vs. Canady, 58 Ill. 425, Canady claimed a homestead upon a lot 60 by 120 feet. His dwelling house was mostly on the east half of the lot, about four feet of it, and seven feet of the smoke-house were on the west half, as

also the garden, fruit trees and well. There was a storehouse 20 by 45 feet on the west half, which set back six or eight feet from the end, which was in the occupancy of a tenant. The whole lot did not exceed in value one thousand ($1,000.00) dollars. The plaintiffs in error claimed under an execution sale against the said Canady for that portion of the lot upon which the store in the occupancy of a tenant was situated. Canady filed a bill in equity to protect his rights to the whole of the homestead.

The court in deciding the case, by Sheldon, J., says:

"The points made by the plaintiffs in error are, that the storehouse was not part of the homestead; that Canady is bound by the judgment recovered against his tenant, and a delay in filing the bill shows such laches as will prevent the court from entertaining it."

"Reinbach vs. Walter, 27 Ill. 393, is cited in support of the position that this storehouse was not part of the homestead. That was a case of two lots not exceeding, together, one thousand dollars in value; the homestead law was not held to apply, but the court said that if it did, they should be inclined to hold that the store and warehouse and the grounds used for the business done in that, did not constitute a part of the homestead. But here is only one lot of ground, sixty by one hundred and twenty feet. The homestead exemption as given by the statute embraces 'the lot of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, to the value of one thousand dollars.' The whole lot of ground is covered by the exemption, not some part of it, and the lot included all the buildings upon it. We are not to regard the intention of the legislature as being only to save a mere shelter for the debtor and his family, but that it was the

purpose to give him the full enjoyment of the whole lot of ground, exempted to be used in whatever way he might think best for the occupancy and support of his family, whether in the way of cultivating it or by the erection and use of buildings upon it, either for the carrying on of his own business or for deriving an income in the way of rent. We cannot accede to that narrow construction of the statute, which would take away the storehouse as not being a part of the homestead."

The above case, decided under a statute very much like the statute of Montana, with reference to the amount of land allowed to be claimed as a homestead, has certainly a great deal of weight upon this question, and we think the reasoning of the case commends itself as being sound and in accordance with the spirit and objects of the homestead laws. The facts in the above case could hardly be more like the facts in the case at bar. There the homestead claimant had rented the storehouse, a distinct portion of the premises. Surely a much stronger case of the segregation of a portion of the homestead premises than can be claimed in the case at bar. But yet the court held that the residence of the homestead claimant on the lot made his title good as to the whole of the homestead claim. The foregoing case was approved and quoted from at length, in the case of Stevens vs. Hollingsworth et al., 74 Ill. 202, in which last mentioned case the court, by Schoffield, J., on page 208, said:

"While evidence has been received to show that two or more subdivisions of real estate constitute a lot, within the meaning of the homestead act, in no instance has the evidence been received to show the lot was less than a subdivision, simply because the debtor used a portion of it for prosecuting his business. It would be difficult to explain, upon any principle of correct reasoning, why the farmer shall have his farm of eighty acres adjoining his

dwelling house on a town lot, and yet the mill of the miller, or the shop of the mechanic, although on the same lot with his dwelling house, shall not be exempt. Or, narrowing the application, why the garden, stables, yards, orchard, etc., shall be exempt, and the shop, mill or business house, although indispensably necessary to earn a support for the family, and located on the same lot of ground with the residence, shall not be exempt. The homestead, however, is not limited to the ground occupied by the residence, but to the lot of ground and the buildings thereon, and each is presumably of the same importance to the debtor."

In the case of Bailey vs. Banknight, 25 S. W. Rep. 56, where the homestead claimant built a house on a lot adjoining his homestead, and occupied it with his family, renting the old house, except one room which his family continued to use as a parlor and bedroom, the lessee also sometimes using it as a parlor; his family took their meals with the lessee in payment for rent, it was held, that both lots upon which were situated both the old and the new house, constituted the debtor's homestead.

In Hancock vs. Morgan, 17 Tex. 582, where the homestead claimant had rented a portion of the premises and built a fence separating himself from his tenant, it was held that such acts did not subject a homestead to forced sale.

In Winland vs. Holcomb, 3 N. W. Rep. 341, where the judgment debtor owned a three-story brick building, occupying the second story as a residence for himself and family, the first story being occupied by his tenant at will, the third by his tenant under a written lease for five years, and for the further term of five years, if the tenant should so choose, it was held that the entire building was exempt, and the court, by Gilfillan, J., said:

"The defendant could devote the third story of his build-

ing to any use he chose without affecting the exemption; so that, even if there were no practicable difficulty in separating the third story from the remainder of the property, for the purpose of a levy and sale, it could not through an execution be appropriated to the satisfaction of the judgment; and what cannot merely because of the exemption be so appropriated through an execution, cannot be so appropriated by any proceeding of a court. Now, the order under consideration is in effect an appropriation of this third story for a term of years until July 1st, 1881, certainly, and for five years longer if the lessee in the lease choose to continue the tenancy to the satisfaction of the judgment; that story and the right to the use of it, is for that time taken from the defendant. If by an order a court may deprive him of the right to use it for two or seven years, it may for any longer time. The power of a court to so deprive him of its use is not affected by the fact that there is an outstanding lease; if it were, then it would not be true, as held in Kelly vs. Baker, that the owner may devote the part of the property exempted, not actually used as a dwelling, to any use he chooses, without removing the exemption from that part."

In Layson vs. Grange, 29 Pac. Rep. 585, where a debtor owned a house and three lots containing less than one acre within the limits of the city, upon which he resided with his family, and also had a carpenter shop which he afterwards converted into rooms, which he rented to a family, but did not lease any portion of the ground, but simply gave the tenant the right of ingress and egress to and from the premises, and reserved the basement of such building for his own use, as well as the lot upon which the building was situated, it was held that the whole property was a homestead and as such was exempt from forced sale upon execution.

In Phillips vs. Rooney, 9 Wis. 70, 76 Am. Dec. 244, under a statute, which reads as follows:

> Section 51. "A homestead consisting of any quantity of land not exceeding forty acres, used for agricultural purposes, and the dwelling house thereon, and its appurtenances, to be selected by the owner thereof and not included in any town plat or city or village, or instead thereof, at the option of the owner, a quantity of land not exceeding the amount of one-quarter of an acre, being within a recorded town plat, or city, or village, and a dwelling house thereon, and its appurtenances, owned and occupied by any resident of the state, shall not be subject to forced sale on execution, or any other final process from a court, for any debt or liability contracted after the first day of January, in the year One Thousand Eight Hundred and Forty-nine."

It was held that the benefit of the exemption was not lost by the owner's neglect to use a portion of his dwelling house with his family, or by appropriating the same portion to some other use. In fact, the homestead claimant had leased the basement of the building and the first story, consisting of a room 20 feet front by 150 feet deep, and the same was occupied by tenants under him as a wholesale and retail store. The court, by Cole, Justice, says in its opinion:

> "The language of the statute is so clear, precise and unambiguous that there can be but little difficulty in arriving at its real meaning. The counsel for appellant in a very able argument, which he addressed to the court upon this case, asked what was to be understood as a homestead, in an ordinary, familiar and popular sense of the word. I think I can substantially adopt the definition which he gave, and which I think the word must have as used in this statute, that is, a homestead is the land in a

city not exceeding the prescribed amount upon which is the dwelling house, or residence, or habitation, or abode of the owner thereof and of his family. Evidently the statute does not contemplate that this dwelling house, or habitation, or abode thereon shall be constructed in any particular style, or built in any particular prescribed manner. But it is to be in good faith, and truly, the dwelling house, or residence, or abode of the owner and of his family, in order to be exempt."

In Kiesel vs. Clemmens, 56 Pac. p. 84, the court, by Huston, C. J., said:

"The only question presented by this record for our consideration is: Was the property described in the declaration of homestead, at the time the same was made and recorded, subject to be declared upon as a homestead under the statutes of Idaho? The district court held that, by reason of said premises being occupied by defendant and his family as a hotel at the time the declaration of homestead was filed, the same was not subject to homestead declaration, and the declaration filed thereon was void and of no effect to exempt said premises from levy and sale on execution. With this conclusion of the district court we cannot agree. The character of the occupancy or use of the premises claimed as a homestead, so long as the same is occupied by the declarant as a residence and a home for himself and family, is immaterial under the statutes of this state. The only limitations prescribed by the statutes of this state to the acquisition of homestead rights are residence and value. There is no distinction in our statutes, as there is in many of the states, between real estate located in the town, city or village, and lands used and occupied as a farm. There is no limitation in our statutes upon the amount of land that may be included in

a homestead, so long as it is occupied as a residence, and does not exceed in value the limitations prescribed by the statute. If other limitations are deemed requisite, they must be fixed by the legislature and not by the courts."

So in the case at bar, the legislature having fixed by Section 1693, Civil Code of Montana, the amount of land which can be claimed and selected as a homestead, and the value of the property which may be held by a homestead claimant, no other limitations are allowable, and the lot claimed as a homestead being actually used as a residence for the family of a homestead claimant, the homestead exemption by force of the law includes the whole of the lot and premises, provided that it does not exceed in area one-quarter of an acre of ground.

In the case of Skinner vs. Hall, 69 Cal. 195, the homestead claimant prior to the time of his declaration of homestead which was in question, had rented his house and lot by the month for the monthly rental of $15.00. On the day prior to the filing of the declaration of homestead, which was in question, he made an arrangement with his tenant by which he gave up part of the rent and was permitted to occupy the front room of the house, and on the night of the day prior to the filing of said declaration of homestead, he took to the room some bedding and slept there. He then filed his declaration of homestead on the 25th day of January, 1881, having on the same day filed a declaration of abandonment of prior homestead claimed by him on the same premises. He then continued to sleep in the room until May, 1881, when the tenant gave up the house, and the wife and child of the homestead claimant joined him and occupied the premises.

The court in deciding this case, after maintaining the validity of the homestead declaration filed under the circumstances as above set out, goes on to say in the opinion:

"So one may file and maintain a homestead upon property which is partially rented out or used for other purposes than his residence. (Ackley vs. Chamberlain, 16 Cal. 181; Phelps vs. Rooney, 9 Wis. 70.) It is also claimed for the appellants that the south half of the lot, back as far as the poultry yard fence, was not impressed with the character of homestead, and to that extent, at least, the court erred in its conclusions. As has been seen, the whole lot was but 62 feet wide and was all enclosed. It was divided by a fence running back to the poultry yard, and the outbuildings and house were upon the northern half. Still, the court thought it all constituted a homestead and was exempt from forced sale; and we cannot say its conclusions were not justified by the facts."

In the case of Heathman vs. Holmes, 94 Cal. 291, the court, in discussing this question, said, on page 294 of the opinion:

"We think the court below erred in disallowing the injunction. We have not been referred to any decision of this court where the facts were exactly like those of the case at bar; but it has been held here that using a building partly, or even chiefly, for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is, and continues to be, the bona fide residence of the family."

Plaintiff in error states in her brief that Section 1693 of the Civil Code of Montana is a continuation of the law as it formerly stood in Montana under the Compiled Statutes, and that said law was borrowed from the state of California, and much of her argument is based upon the proposition that Section 1693 of the Civil Code of the State of Montana, *supra,* was at one time the law in California, and that the decisions of that state have construed the same favorably to her contention. This

statement is entirely erroneous. No similar provision was ever contained in the laws of California. The statute of California at the time of the decision of Gregg vs. Bostwick, 33 Cal. p. 225, is given in the opinion of the court, and is as follows:

> "The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after the passage of the act to which this is amendatory."

It will be observed that this statute does not grant to the homestead claimant a specific area of land with the dwelling house thereon, as is done by Section 1693 of the Civil Code of the state of Montana. And even under this section of the statute the ruling of the California courts has not been uniform. Prior to the case of Gregg vs. Bostwick, it was held in California, in accordance with the very learned decisions and sound reasoning of the Nevada courts, that although a specific quantity of land was not granted, yet, if the value did not exceed five thousand dollars, it would all be exempt, provided the dwelling house was situated thereon, no difference what use the premises were put to, and since the decision of the Gregg vs. Bostwick case, the courts of California have departed from the doctrine therein enunciated.

See: Skinner vs. Hall, *supra.*

Heathman vs. Holmes, *supra.*

To show that Section 1693, *supra,* or its equivalent, was never in the Code of California, the court's attention is invited to Gaylord vs. Place, 98 Cal. p. 478, in which the court said:

> "A homestead in the country may include a farm, whether it contains a hundred or a thousand acres, and

whether it is used for the ordinary purposes of farming or for grazing and raising stock. The only tests are use and value. Its value must not exceed five thousand dollars, and its use must be primarily as a home for the family. Whatever is used being either necessary or convenient as a place of residence for the family, as contradistinguished from a place of business, constitutes the homestead, subject to the statutory limit as to value."

Plaintiff in error has cited many cases in support of her contention that will, almost uniformly, be found to be under homestead statutes in which the definition of a homestead is given, as it is in Section 1670 of the Code of Civil Procedure of the State of Montana, with a limitation only as to value. This renders such cases inapplicable to the homestead laws of the State of Montana. Wherever the decisions have been under statutes analogous to Section 1693, *supra,* they are invariably in accordance with our contention as to the proper construction, and, as we have heretofore said, we think the construction of this section has been settled in the case of Yerick vs. Higgins, *supra.*

Adopting, however, the doctrine of principal or primary use insisted upon by plaintiff in error, she was not entitled to the instructions asked for, for the reason that the tetstimony, as we have heretofore stated, is uncontradicted as to the character of the use to which the whole of the premises claimed were put to at the time of the filing of the declaration of homestead, and this testimony shows the entire premises to have been then used primarily as a homestead for the defendants in error. The whole of one house and one room of the other was used for the family, and four rooms only of the addition to the older house was rented to tenants. The front yard was used in common, there was no division fence between the houses, and that portion of the back yard which was separated by an improvised

fence, was used in common as a garden spot. The whole was enclosed by a substantial outside fence. The following cases demonstrate that the mere leasing of a portion or a majority of the rooms of a house does not destroy the homestead character of the premises:

Hubbell et al. vs. Canady, *supra.*
Layson vs. Grange, *supra.*
Hancock vs. Morgan, *supra.*
Bailey vs. Banknight, *supra.*
Winland vs. Holcomb, *supra.*
Phelps vs. Rooney, *supra.*
Kiesel vs. Clemens, *supra.*
Skinner vs. Hall, *supra.*

The testimony of Pinegar, Transcript, p. 34, and the map, Transcript, p. 36, and the testimony of all other witnesses, show that the plaintiff in error arbitrarily segregated the southern portion of the lot and sold it separate, claiming it to be not exempt. That she included in this portion of the lot land which had never been divided from the other by any division fence, and had never been leased by the homestead claimant at any time to tenants. The front yard, about two feet of the passageway between the two houses, and that portion of the premises and the room which was occupied by the McCafferys at the time of the filing of the declaration of homestead. She thus sold more land, and claims more as subject to execution, than under any feature of this case she would be entitled to claim, and, therefore, the entire sale would be void.

We very respectfully submit that under the authorities and Section 1693, of the Civil Code of Montana, the defendant in error was entitled, having filed the proper declaration, to claim as exempt the entire one-quarter of an acre, notwithstanding four rooms of one of the houses situated thereon was leased to

tenants, provided the value of the one-quarter of an acre did not exceed twenty-five hundred dollars, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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